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MICHAEL RODAK, JR.

In The

Supreme Court of the United States

October Term, 1973

No. 73-1711

In the Matter of

JAMES NAPOLI,

Petitioner,

vs.

THE STATE OF NEW YORK, THE SUPREME COURT OF THE STATE OF NEW YORK, THE SEVERAL JUDGES THEREOF, INDIVIDUALLY, AND AS JUDGES OF THE SAID SUPREME COURT, CRIMINAL TERM, COUNTY OF NEW YORK, and HONORABLE FRANK S. HOGAN, DISTRICT ATTORNEY, NEW YORK COUNTY, AND HIS SUCCESSORS AND HIS REPRESENTATIVES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS, STATE OF NEW YORK

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Reasons for Granting the Writ:

I. The fundamental issue presented by this petition is whether the prohibition against double jeopardy precludes a retrial of the petitioner under the indictment herein. It cannot be disputed that the Trial Judge declared a mistrial over the objection of both the prosecution and the defense counsel, and that there was no "manifest necessity" for this declaration. 17

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II. The case is properly before this Court since Harris v. Washington, 404 U.S. 55, recognizes that a writ of prohibition is a proper method for testing the double jeopardy question in a state proceeding. An analysis of the record reveals that under no circumstances could the majority of the Justices in the Appellate Division, upon which opinion the Court of Appeals relied, have come to the conclusion that a mistrial motion was still pending. Even if it were, however, the unmistakable declarations by the petitioner and the prosecution that no mistrial was desired, precluded the declaration of such an extravagant and extreme edict since there could not be any pretense at the existence of "manifest necessity." 26

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In The

Supreme Court of the United States

October Term 1973

No. 73-

In the Matter of JAMES NAPOLI,

Petitioner,

vs.

THE STATE OF NEW YORK, THE SUPREME COURT OF THE STATE OF NEW YORK, THE SEVERAL JUDGES THEREOF, INDIVIDUALLY, AND AS JUDGES OF THE SAID SUPREME COURT, CRIMINAL TERM, COUNTY OF NEW YORK, and HON. FRANK S. HOGAN, DISTRICT ATTORNEY, NEW YORK COUNTY, AND HIS SUCCESSORS AND HIS REPRESENTATIVES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS, STATE OF NEW YORK

STATEMENT

Petitioner, James Napoli, petitions this Court and prays that it grant a Writ of Certiorari to review the order of affirmance of the Court of Appeals of the State of New York rendered the 14th day of February, 1974, affirming the order of the Appellate Division of the Supreme Court of the State of New York, First Department, (two justices

dissenting), which declined to issue an order pursuant to Article 78 of the New York Civil Practice Law and Rules seeking to prohibit the trial of petitioner for the crimes of perjury and criminal contempt on the grounds that such trial would constitute double jeopardy.

OPINION BELOW

The Court of Appeals, in affirming the Appellate Division, adopted the opinion of Mr. Justice Steuer of the Appellate Division, First Department, which opinion is set forth in an appendix to this petition.

JURISDICTION

The jurisdiction of this Court is predicated upon 28 U.S.C. Section 1257(3). The Court of Appeals affirmed the order of the Appellate Division on February 14, 1974.

QUESTIONS PRESENTED

1. Whether petitioner will be placed in double jeopardy by virtue of the determination of the Courts below that notwithstanding a mistrial declared by the Trial Judge over the objections of both the petitioner and the prosecution, that he may nevertheless be retried upon the original indictment?

2. Whether the declaration of a mistrial over objection of the petitioner, once the trial has commenced and witnesses have testified, precludes a retrial upon the same indictment, in view of the Fifth Amendment of the United States Constitution barring exposure to double jeopardy?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution is involved herein as well as Article I, Section 6 of the New York State Constitution, Section 40.20 of the Criminal Procedure Law of the State of New York and Article 78 of the New York Civil Practice Law and Rules.

THE FACTUAL BACKGROUND

The *issue* is not complex or esoteric in the least. Simply stated it involves the question of whether a defendant may be retried upon an indictment after a Justice of competent jurisdiction, before whom the trial was proceeding, has declared a mistrial over the objections of both the prosecution and defense.

We ask this tribunal to bear in mind that the trial was proceeding non-jury and that witnesses had testified so that there was no question but that jeopardy had attached.

It is most significant that no lay jury was involved since petitioner had elected to proceed non-jury. There was thus no danger of prejudice to lay jurors by any of the events that ensued during the proceedings.

The occurrences leading up to the situation presented upon this appeal will be detailed, *infra*, but for the moment it is sufficient to note that the Trial Justice was not in anyway prejudiced by the events, nor did he seek to disqualify himself. As a matter of fact, the *nisi prius* Justice, after declaring a mistrial over the protests of both parties, immediately set the matter down for a retrial before himself in Part 42 (the part to which Justice Blangiardo was assigned) on November 27, 1972.

There was thus no earthly reason to have declared a mistrial in the first place since the trier of fact would remain the same; the parties would be unchanged; and no different evidence would necessarily be adduced. The declaration that there be a mistrial was an exercise in futility. No cogent reason exists or can be fathomed for the Court's peculiar action. It is beyond cavil that there was no "manifest necessity" for the declaration of the mistrial.

To eliminate the possibility that the Court, being inexperienced perhaps in criminal law, was unaware of the consequences of its calculated action, we ask this Court to note that the prosecution expressly informed the Judge that his strange behavior could well create a double jeopardy problem.

Casting aside these admonitions and the vehement protests of both parties that they were ready to proceed, Judge Blangiardo plummeted forward into a dilemma where "angels would fear to tread," and declared the mistrial, in spite of the cautionary supplications of the prosecutor and defense counsel, both of whom were experienced criminal lawyers.

It is therefore manifest that the Trial Court acted with premeditated and deliberate recognition of its actions with an unquestioned awareness of the irrevocable consequences.

FURTHER CONSIDERATION OF THE FACTS

The petitioner was indicted in New York County charged with perjury and contempt under indictment 6166/69. The trial proceeded non-jury by express waiver of the appellant in Part 42 of the Supreme Court, New York County before (Acting) Justice Blangiardo. It commenced on October 31, 1972.

Two motions were made during the course of trial for a mistrial, neither of which were granted. The first was made on November 2, 1972 because of possibly prejudicial publicity which appeared in the local press (574-78).

On Friday, November 3, 1972, the petitioner again moved for a mistrial because of the failure of the prosecution to comply with *Brady v. Maryland*, 373 U.S. 83 by withholding exculpatory material. The Court stated that "under the circumstances, I'm reserving decision on the motion for a mistrial" (A79). [1]

The Court then addressed defense counsel, Gregory Perrin, inter alia:

> "Mr. Perrin, if after you have examined this information as submitted by the district attorney, you still feel that you are being prejudiced, the defendant is being prejudiced, I will then hear further arguments and then I will decide your motion" (A80).

1. Numerals in parentheses with the prefix "A" refer to the appendix; where no prefix is used, they refer to the record of the official court reporter's minutes of trial.

The material was in fact turned over to the defense attorney that same day (A26) and the Court was advised that Napoli would be ready to proceed with the case on Monday (A26-A27). The Court clearly indicated that the trial would continue on Monday:

> "The Court: Then you have no problem before you. If that is all the information you have, you will so certify to me, and there is no problem.
>
> Mr. Yasgur: Fine sir. I will be prepared to finally certify that to your Honor Monday morning, sir.
>
> The Court: All right. You will have until noontime, Monday morning.
>
> I am directing you to have this witness, Detective Coffey, available for this Court and for cross examination by the defendant.
>
> Mr. Yasgur: Very well, sir.
>
> The Court: He is to lay all other business aside. That is the direction"(A88).

The complaint that precipitated the motion for the mistrial was now vitiated since the requested *Brady* material had been supplied. Another sure indication that the motion for a mistrial had been denied and that the case would proceed is the colloquy between the Court and prosecution about a visit to the Unicorn restaurant which figured in the case. The Judge reminded the assistant that

there "will be another available time in the forthcoming week" to make that visit (A94).

The Court indicated that it might well conduct such a *voir*, but revealed that the *trial would proceed* in the meanwhile.

> "The Court: All right. I imagine *there will be other available time in the forthcoming week.*" (A94).

On Monday morning, counsel both told the Court they were ready to proceed and in fact the trial did resume. Detective Coffey was recalled to the witness stand and actually testified (A113-115). *Both sides answered ready* (A27-A28).

Suddenly, out of the "blue" the Court inexplicably told both counsel that it was going to "reverse" the decision of the past Friday and would now grant the mistrial:

> "The Court: Don't overshout me, Mr. Yasgur.
>
> Mr. Yasgur: I apologize to the Court.
>
> The Court: I don't feel there is any necessity of further discussion. I am reversing my decision of Friday, because I do feel this defendant has been so prejudiced. So, I am reversing my decision."

The context of this ruling must be appreciated. The Court was reminded that the defense did not want any delay and that it was no longer claiming prejudice since the material was supplied (A115-A116). Mr. Yasgur, the prosecutor, admonished the Court.

> "Mr. Yasgur: Counsel at the bench this morning when your Honor informed the Court and both of us, that your Honor was considering the motion for a mistrial, that counsel informed the Court that counsel was fully prepared to proceed this morning, did not wish an adjournment.
>
> Your Honor seemed to indicate that you believed an adjournment would be requested. None was. Both sides have indicated that we are prepared. Counsel hasn't stated that he needs any further time to prepare or that he has been prejudiced."

The prosecution was quite aware of the import of the objectionable action by the court. He plaintively, but futilely reminded the Trial Judge about the problem of double jeopardy to which the Court turned a deaf ear:

> "Mr. Yasgur: I want the record to be quite clear, your Honor, that this decision of the Court is made in response to counsel's motion for a mistrial. As I have explained to the Court this morning, if your Honor makes — grants a mistrial here, and it is not clearly on counsel's motion, then your Honor may be creating a *double jeopardy* issue in this case" (A116-A117).

The Court, it must be borne in mind did not disqualify itself but merely set the case down two weeks later. The People wanted the trial to be continued and understandably protested:

> "The People, your Honor, take exception to the Court's ruling" (A117).

Since the defense was satisfied with the material furnished and claimed no prejudice, it is extraordinary and paradoxical that the Court should appoint itself as the protector of the defendant and insist that counsel was going to accept the mistrial if he had to shove it down Napoli's throat, which is what in essence happened.

Since this was a trial without a petit jury, the Court had no "Hobson's choice" to make once informed that no one wanted an abortion of the trial. We ask rhetorically, what possible justification was there for a mistrial once both sides notified the Court they were anxious to proceed? None whatsoever! Certainly no "manifest necessity" existed.

Petitioner's trial attorney emphatically said that he objected to a mistrial (A121). He reassured the Court that Napoli was ready to proceed then and there:

> "Mr. Perrin: I am not asking for any recess whatsoever, your Honor. I think the defendant's position is as I stated earlier, we were ready to proceed, and as the District Attorney put on the record, I indicated to you this morning that I was ready to proceed" (A123-A124).

The People asked the Court again to reconsider its ruling cautioning:

> " . . .your Honor, what has happened in this courtroom this morning, granting a mistrial for the following objection by the defendant, may well raise a serious legal issue as to whether or not double jeopardy would bar a future trial" (A127).

The prosecutor even called *United States v. Jorn* to the Court's attention, but to no avail (A128).

Defense counsel then asked the Court to proceed with the trial and made it crystal clear that Napoli was *not* seeking a mistrial at all (A131-A132).

Mr. Perrin emphatically proclaimed:

> " . . .Your Honor, I submit to you that *we have objected this morning to the Court's granting of a mistrial,* in that it's our opinion that there was *no such motion before the Court as a result of our willingness to proceed.*
>
> We submit to you further that there is *no manifest necessity* for this, at this time, and the motion at this time — rather the declaration of a mistrial is not as a result of any actions taken by the defendant" (A132).

The Court stubbornly refused to budge and was heedless of the entreaties and monitions of both experienced lawyers.

After the colloquies were concluded, the Court made it clear that it was sticking to its ruling that a mistrial was declared despite the objections of the only people concerned. The defense then interjected:

"Mr. Perrin: Note the Defendant's exception.

The Court: Your exception is noted.

Mr. Yasgur: The People's vigorous exception" (A133).

The Court then confused everything even further by taking an exception itself! One is constrained to wonder if the Court even understood what it was doing since it remarked:

"The Court: Both side's exceptions are noted. And *I actually take exception also* to the entire proceeding" (A134).

The prosecutor refused to join in the naming of a new trial date insisting that the Court had abused its discretion in granting a mistrial altogether (A134-A135).

THE OPINIONS BELOW CONSIDERED

We shall not dwell *in extenso* on the opinions below since this Court may do that at its leisure. Needless to say, petitioner believes the Presiding Justice and Justice Murphy were correct in their dissent.

With respect to the majority, however, we ask the Court to note that there was an error in fact made when Justice Steuer asserted that taking of testimony did not resume on Monday after the mistrial motion was denied (A10).

Actually, Detective Coffey resumed the stand and testified (A113, ff). Also, it is apparent that exhibits were marked and some received into evidence on that Monday morning as well (A97-A113).

The majority moreover failed utterly to confront the issue of "manifest necessity" (*Matter of Ferlito v. Judges of the County Court*, N.Y.2d December 28, 1972; *Matter of Nolan v. Court of General Sessions*, 11 N.Y.2d 114, 119; *United States v. Jorn*, 400 U.S. 470; *United States v. Perez*, 9 Wheat. [22 U.S.] 579, Story, J.).

It is noted further that *Matter of Ferlito v. Judges of the County Court of Suffolk County*, 39 App. Div. 2d 17, was affirmed by the Court below despite the far greater basis for the Court's action at trial there than exists herein. The majority interpreted *Gori v. United States*, 367 U.S. 364 as permitting the declaration of a mistrial by a judge even where his action is premature or over-assiduous.

The dissent correcting the interpretation of the majority pointed out that *Gori* permitted a mistrial only "in the sole interest of the defendant because the ends of substantial justice could not otherwise have been attained" (A18).

The reasoning of the majority was no doubt motivated by a sympathetic concern for the actions of a supposedly inexperienced Judge for whom petitioner cannot feel concern, since he consistently and stubbornly refused to pay attention to the admonitions and entreaties of both experienced trial lawyers.

We feel that this Court will view the errors below in true perspective of a knowing and deliberate declaration of a mistrial after everyone concerned insisted there was no motion pending and that none was desired by either side, defense or prosecution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 5.

"AMENDMENT [V]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

New York State Constitution, Article I, No. 6.

"[Grand jury; right to counsel; informing accused; double jeopardy; self-incrimination; waiver of immunity by public officers; due process of law]

No person shall be held to answer for a capital or otherwise imfamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of information in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law. Amended Nov. 8, 1938; Nov. 8, 1949; Nov. 3, 1959; eff. Jan. 1, 1960."

Section 40.20, Criminal Procedure Law

"No. 40.20 Previous prosecution; when a bar to second prosecution

1. A person may be twice prosecuted for the same offense.

2. A person may not be separately prosecuted for two offenses based upon the same act or criminal transaction unless:

(a) The offenses as defined have substantially different elements and the acts establishing one offense are in the main clearly distinguishable from those establishing the other; or

(b) Each of the offenses as defined contains an element which is not an element of the other, and the statutory provisions defining

such offenses are designed to prevent very different kinds of harm or evil; or

(c) One of such offenses consists of criminal possession of contraband matter and the other offense is one involving the use of such contraband matter, other than a sale thereof;

(d) One of the offenses is assault or some other offense resulting in physical injury to a person, and the other offense is one of homicide based upon the death of such person from the same physical injury, and such death occurs after a prosecution for the assault or other non-homicide offense; or

(e) Each offense involves death, injury, loss or other consequence to a different victim; or

(f) One of the offenses consists of a violation of a statutory provision of another jurisdiction, which offense has been prosecuted in such other jurisdiction and has there been terminated by a court order expressly founded upon insufficiency of evidence to establish some element of such offense which is not an element of the other offense, defined by the laws of this state. L. 1970, c. 996, No. 1, eff. Sept. 1, 1971."

REASONS FOR GRANTING THE WRIT

I.

The fundamental issue presented by this petition is whether the prohibition against double jeopardy precludes a retrial of the petitioner under the indictment herein. It cannot be disputed that the Trial Judge declared a mistrial over the objection of both the prosecution and the defense counsel, and that there was no "manifest necessity" for this declaration.

In the Courts below, the petitioner, Napoli, sought to prevent a retrial on charges filed against him for the crimes of perjury and criminal contempt in an indictment pending in New York County. The Trial Court commenced hearing evidence in a non-jury trial for the aforesaid charges. Witnesses were actually sworn and gave testimony.

Preliminarily, therefore, we submit that there can be no doubt but that jeopardy had attached.

See *United States v. Jorn*, 400 U.S. 470; *United States v. Walden*, 448 F.2d 925, 929 (4 Cir.); and *United States v. Perez*, 22 U.S. (9 Wheat.) 579.

The fact that this case was being tried non-jury does not change the rule.

It is well settled that jeopardy attaches in the prosecution of a criminal case which is tried to the Court without a jury "at the point where the presentation of proofs begin." *State v. Blackwell*, 65 Nev. 405, 198 P.2d 280, 200 P.2d 698, cert. denied, 336 U.S. 939.

In *Markiewicz v. Black*, 138 Colo. 128, 300 P.2d 539, 75 A.L.R.2d 678, the Court approved the rule governing "the point of time when or the state of the prosecution at which jeopardy attaches." That rule is stated in 22 C.J.S. Criminal Law Section 241, p. 375 and includes in pertinent part the following statement:

> " . . . In a case submitted to the court without a jury, jeopardy begins after the accused has been indicted, arraigned, and has pleaded, and the court has begun to hear evidence, . . . ".

We submit the foregoing citations only to eliminate any question but that jeopardy had attached in the case at bar.

Historically, under the common law, not only was a second punishment for the same offense prohibited, but a second trial was forbidden whether or not the accused had suffered punishment, or had been acquitted or convicted. (*Ex parte Lange*, 18 Wall. 163, 169 [1874]). This clause, that is the Fifth Amendment of the United States Constitution, embraces all cases wherein a second prosecution is attempted for the same violation of law, whether felony or misdemeanor. (*Ibid.* 172, 173.)

Almost a century ago, a closely divided court held that the protection against double jeopardy prevented an appeal by the Government after a verdict of acquittal. (*Kepner v. United States*, 195 U.S. 100 [1904]).

In its traditional application, double jeopardy is a rule of finality; a single fair trial on a criminal charge bars re-prosecution. Double jeopardy shares the purposes of

civil law rules of finality; it protects the defendant from continuing distress, enables him to consider the matter closed and to plan ahead accordingly, and saves both the public and the defendant the cost of redundant litigation. But double jeopardy is not simply *res judicata* dressed in prison gray. It was called forth more by oppression than by crowded calendars. It equalizes, in some measure, the adversary capabilities of grossly unequal litigants. It reflects not only our demand for speedy justice, but all of our civilized caution about criminal law — our respect for a jury verdict and a presumption of innocence, our aversion to needless punishment, our distinction between prosecution and persecution. Distilled, these diverse considerations yield three rules designed to implement three particular policies.

First, the double jeopardy bar on re-prosecution after an acquittal makes the status of innocence meaningful and minimizes the chance that innocent men will be convicted.

Second, the rule prohibiting re-prosecution after a conviction denies the prosecutor the same control over punishment. Without this rule the prosecutor could continue to prosecute until he found a judge willing to give an appropriate sentence.

Finally, and most importantly, rules against re-prosecution, after either prior acquittal or prior conviction, or for that matter after an unwarranted mistrial, prevent the prosecutor from using criminal prosecutions to inflict unnecessary suffering upon defendants. A criminal trial warps the defendant's life and consumes his money. The Constitution allows this ordeal

to be imposed only once and for reasonable cause, not repeatedly at the prosecutor's whim (see generally, 75 Yale L.J. 626, 277-79 [1965]).

We have detailed the factual events leading up to the declaration of a mistrial in the *nisi prius* court *in extenso*. We submit that the only interpretation that can be placed upon the record is that the Trial Court declared a mistrial *sua sponte* since both the defendant (petitioner) and the People strenuously objected to it.

The defense requested a mistrial on the 3rd of November 1972 because of the fact that the prosecution had obviously defaulted in its obligations under *Brady v. Maryland*, 373 U.S. 83, since exculpatory material existed which the district attorney failed to call to the attention of the defense.

The prosecutor however, represented that he would turn this material over to the defense that very day. Accordingly and consistent with its promise, the material was given to Napoli on the 3rd of November.

The Trial Court told Napoli's lawyer that he could "renew" the motion on Monday, November 6th if the material had not been delivered. The Judge indicated he'd visit the Unicorn restaurant later in the week (A94).

On the 6th, however, both parties reported that the *Brady* material had been turned over and they were ready and anxious to proceed.

This was a non-jury case, so no petit jurors were involved.

Contrary to the opinion below, testimony was taken on Monday, the 6th of November (Detective Coffey, R113, ff, and exhibits were marked, (A97,ff). Suddenly, the Trial Judge (Blangiardo, J., an acting Supreme Court Justice) declared that he was "reversing" his prior ruling and was granting a mistrial.

Both parties strenuously objected and insisted that they did not want a mistrial and were ready to proceed then and there. Moreover, to eliminate any possibility that this supposedly inexperienced[2] justice was unaware of the double jeopardy overtones of his action, the prosecutor begged and harangued him to reconsider, specifically explaining the law as to double jeopardy and even citing *United States v. Jorn*, 400 U.S. 470.

Plummeting stubbornly into an area where "angels would fear to tread", the Trial Court over-ruled objections and exceptions and stuck to his guns. Paradoxically and confusingly, even the Trial Judge "excepted" to what had occurred — this being the first occasion the writer of this brief has ever seen where a judge took an "exception" (A134).

The Trial Court accomplished absolutely nothing by the declaration of a mistrial from the standpoint of the interests of justice since he set the case down for trial before his own part for two weeks hence.

---

2. We say the Trial Judge was inexperienced since he had only previously sat in the Civil Court, but we understand that he had been an assistant district attorney at one time. Inexperience cannot excuse his actions in view of the record.

Even New York State recognizes the general rule that "manifest necessity" is the criterion by which we judge whether or not it is proper to have declared a mistrial. The law does not favor the granting of mistrials and only when interests of justice demonstrate that the action of aborting the trial was "manifestly necessary" will such drastic declarations be sustained.

Recognizing that a justice presiding over a criminal trial "must exercise its own judgment when declaring a mistrial" (*People ex rel. Epting v. De Voe*, 284 App. Div. 1092, aff'd. 309 N.Y. 818), the unanimous Court nevertheless noted that this discretion

> " . . . should be exercised only where taking all the circumstances into consideration there is a *'manifest necessity'* for so acting *(United States v. Jorn . . . United States v. Perez . . . .)* or where there is an *'extreme or absolute necessity*, as by illness or death' *(Matter of Nolan v. Court of General Sessions . . .)*" (Emphasis added.)

Accord, *Matter of Ferlito, supra.*

Having, we believe, established that neither side wanted a mistrial on November 6th, the question next to be resolved is whether there existed a "manifest necessity" for the abortion of the trial (*Jorn, supra*, 400 U.S. at 486).

In *United States v. Walden*, 448 F.2d 925, 929 (4 Cir.), the Court aptly noted:

> "Jorn put upon him (the trial judge) a duty to exhaust all other reasonable possibilities before deciding to foreclose the defendant's option to proceed. The judge must make a 'scrupulous exercise of judicial discretion.' Jorn at 485, 91 S. Ct. 547. The scrupulous exercise of that discretion means that he must seek out and consider all avenues of cure to avoid trial abortion."

In *United States v. Perez, supra*, 22 U.S. (9 Wheat) at 580, the Supreme Court admonished:

> "[T]he power [to abort] ought to be used with *greatest caution*, under *urgent circumstances*, and for plain and obvious causes . . . " (emphasis supplied).

see also: American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury, "Approved Draft, 1968, Section 5.4(c).".

The inescapable answer is that the defendant alone has the right to determine whether or not a mistrial should be declared and where he has elected not to ask for one, the Court is without power to grant it, absent "manifest necessity" which is lacking in the case at bar.

The petitioner, from the date of his indictment, was subjected to "embarrassment, expense and ordeal and compell[ed] to live in a continuing state of anxiety and insecurity." *Green v. United States*, 355 U.S. 184, 187.

In the instant case, the district attorney and the petitioner both objected to the declaration of a mistrial and indeed the Court deliberately rejected the supplications and objections of the litigants. No reason existed for the mistrial when it was declared, since its cause had been eliminated by the supplying of the *Brady* material.

In the recent case of *Illinois v. Sommerville*, 410 U.S. 458 (1973), this Tribunal cogently explained that there must be *manifest necessity* in declaring a mistrial over defense objections once jeopardy has attached. In the *Sommerville* case, this Court explained, citing *Downum v. United States*, 372 U.S. 734, that jeopardy attaches when the jury is impaneled. We maintain, of course, that in the case at bar, since a witness was sworn and began to testify, that there is no doubt but that jeopardy had actually attached.

In *Sommerville*, an Illinois Judge, this Court held, had acted out of "manifest necessity" in declaring a mistrial over defense objection, after the jury had been empaneled and the prosecution discovered that the indictment failed to allege a material element of the crime. Only by a 5-4 majority, this Court decided that a retrial would not violate the Fifth Amendment double jeopardy clause. Mr. Justice Rehnquist made it very clear, however, that the reason for this majority opinion was that there was a clear demonstration of the existence of "manifest necessity" in the actions which the Trial Judge took in the Illionis case.

The crucial question is always whether the declaration of a mistrial was required by a "manifest necessity" or the ends of public justice. The majority held that in the *Sommerville* case it did.

Four Justices vehemently dissented, citing *Downum v. United States* and *United States v. Jorn, supra.*

We cite these cases as demonstrating that even where this Court has sustained the extreme actions of a Trial Court in declaring a mistrial, that it has done so only with the careful recognition that unless there was evidence of clear "manifest necessity." The abortion of a trial can not survive the bar of the Fifth Amendment's double jeopardy clause unless there is unmistakable evidence that the actions of the Trial Judge are fully warranted under the aforesaid "manifest necessity" doctrine.

In *Downum, supra,* this Court held that double jeopardy had attached to bar retrial upon two counts of an indictment where the Government had asked for a mistrial because of a problem with a witness.

Under the foregoing circumstances it is submitted that the Trial Court was completely unjustified in declaring a mistrial, particularly in view of the undisputed evidence that neither side wanted one. In the following Point we shall discuss the allegation that there had been a motion made for a mistrial by the defense which was pending.

II.

The case is properly before this Court since Harris v. Washington, 404 U.S. 55, recognizes that a writ of prohibition is a proper method for testing the double jeopardy question in a state proceeding. An analysis of the record reveals that under no circumstances could the majority of the Justices in the Appellate Division, upon which opinion the Court of Appeals relied, have come to the conclusion that a mistrial motion was still pending. Even if it were, however, the unmistakable declarations by the petitioner and the prosecution that no mistrial was desired, precluded the declaration of such an extravagant and extreme edict since there could not be any pretense at the existence of "manifest necessity".

The opinion of the Supreme Court Appellate Division, First Department, is pertinent to this petition for certiorari since the Court of Appeals relies upon the majority opinion of Justice Steuer. *Two Justices dissented in the Appellate Division.* One of the statements articulated by Justice Steuer, which is apparently begging the question completely, is that he finds that a motion for a mistrial had been made but had not yet been decided by the Trial Judge. We believe that we have already demonstrated, from a recitation of the facts, that Justice Steuer was mistaken in this declaration. What actually occurred is that a mistrial motion had indeed been made by defense counsel at the trial but the Court denied that motion. Defense counsel was seeking certain material under the doctrine of *Brady v. Maryland*, 373 U.S. 83, and the prosecution finally turned that material over to the petitioner.

At this juncture, the reason for a mistrial evaporated. On the Monday following the discussions concerning a mistrial the prior week, everyone seemed ready to proceed and, indeed, a witness actually got on the stand and resumed testimony. The Court, in fact, was looking forward to certain other activities which would be conducted during the trial during the ensuing week. None of the parties, including the Judge, seemed to even contemplate the possibility of a mistrial. Apparently a dispute arose which annoyed Justice Blangiardo in the Trial Court and he declared that he was "reversing" his decision.

In order to reverse a decision, obviously there must have been one made. The decision to which he was adverting, of course, was his denial of the defendant's motion for a mistrial. The defense and the prosecution made it very plain to Justice Blangiardo that they did not want a mistrial anymore, that there was no need for one, and that all parties were ready to proceed. On top of that, the prosecutor, Mr. Yasgur, made it abundantly clear that the Justice was creating a double jeopardy problem if he persisted in declaring a mistrial. The Court nevertheless went blindly forward and ignored the entreaties of both the defense and the prosecution and declared the mistrial, setting a new trial for a short time later the same month.

This made it abundantly clear that there was no possibility of a finding of the existence of "manifest necessity".

As the two dissenting Justices explained in the opinion:

> "In the case at bar, there was no compelling need for the Trial Justice to have interjected himself between defendant and his counsel. The material sought by defense counsel had been obtained and he expressed his readiness to proceed with the trial. While we do not, by this dissent, question the Trial Justice's motives in declaring a mistrial, we do conclude that on this record there was no 'manifest necessity' shown for such declaration. Another prosecution would, therefore, violate the double jeopardy provisions of the federal and state constitutions."

The majority opinion of Judge Steuer, however, obviously does not recognize the need for "manifest necessity" which this Court declared essential in such cases as *Jorn* and *Sommerville*, *supra*, and states:

> "Even over the objection of the defendant, the trial judge, *for any reason he deems compelling*, may declare a mistrial and the defense of double jeopardy is unavailing (*Simmons v. United States*, 142 U.S. 148). Even where the trial judge is overassiduous and his action premature, double jeopardy will not result (*Gori v. United States*, 367 U.S. 364)."

The foregoing citation and quotation from the majority opinion of the Appellate Division which was adopted as the opinion of the New York Court of Appeals, reveals that there is no discussion of "manifest necessity". The Courts below apparently are of the opinion that at the whim or caprice of a Trial Judge, he may declare a mistrial with impunity and subject the hapless defendant, who has objected to it, to further prosecutions.

We submit that this is contrary to the principles enunciated in the several cases heretofore cited.

In *Harris v. Washington*, 404 U.S. 55, this Court declared, *inter alia*, that the principle announced in *Ashe v. Swenson*, 397 U.S. 436, precludes a second trial where the defendant has been acquitted in a previous trial involving the same ultimate factual issue, irrespective of the State's good faith in bringing successive prosecutions.

We think the *Harris* case demonstrates that this instant matter is properly before the Court on this petition for certiorari because just as in *Harris v. Washington*, Napoli has proceeded by way of a writ of prohibition.

It is submitted that there is no other logical way to test the double jeopardy aspects of any prosecution without proceeding by way of an Article 78 proceeding in the nature of prohibition which is provided for in the Civil Practice Law and Rules in the State of New York. Indeed, that was the procedure followed by petitioner Harris in *Harris v. Washington* and this Court entertained that case and reversed the judgment.

The petitioner has already expended considerable money and has been subjected to a great deal of trauma, as well as disgrace, by the pendency of the criminal prosecution. There was no basis for the declaration of the mistrial and certainly was not justified under the doctrine of "manifest necessity".

Under the circumstances, we submit that there should be no further prosecution of petitioner, and we ask this Court to grant the petition for certiorari and direct that

the Courts below grant the Article 78 petition in the nature of prohibition.

Before concluding, we wish this Court to note that in the Court below, the prosecution sought to inject a great deal of completely irrelevant considerations relating to publicity and other matters which had no bearing whatsoever on the issue before this Court, namely whether or not the double jeopardy clause of the Fifth Amendment bars a re-prosecution in view of the Court's action in declaring a mistrial on a particular date over the objections of both the prosecution and the defense.

Whatever occurred days before or in the motion practice prior thereto, not affecting the particular issue at bar, is completely irrelevant. We trust that this Court will not be confused or diverted by similar tactics which the prosecution may advance.

There was no bad faith on the part of trial counsel, and we think it is significant to note that the trial counsel in this case, Gregory Perrin, Esq., is a highly respected member of the New York Bar, having sat as a member of the Board of Directors of the New York County Lawyers Association and, at present, is the incumbent Chairman of the Criminal Courts Committee. Mr. Perrin is also a former Assistant District Attorney in the office of Frank Hogan. It is, therefore, inconceivable that he could have been motivated by bad faith in the procedures followed in this case.

CONCLUSION

The petition for certiorari should be granted and this Court should ultimately reverse the orders of the Court below and direct that the re-prosecution of petitioner Napoli be barred as a violation of the double jeopardy clause of the Fifth Amendment.

Respectfully submitted,

s/ Irving Anolik
Attorney for Petitioner

GREGORY PERRIN and
IRVING ANOLIK
Of Counsel on the Brief

APPENDIX A
OPINION OF APPELLATE DIVISION

SUPREME COURT, APPELLATE DIVISION

First Department, November 1972

Harold A. Stevens, P.J.
Francis T. Murphy,
James B. M. McNally,
Aron Steuer,
George Tilzer, JJ.

In the Matter of James Napoli,

Petitioner,

For an Order pursuant to Article 78 of the Civil Practice Law and Rules directed to and against The Supreme Court of the State of New York, the several judges thereof, individually, and as Judges of the said Supreme Court, Criminal Term, County of New York and Hon. Frank S. Hogan, District Attorney, New York County, and his representatives,

Respondents.

Proceeding brought by petitioner pursuant to CPLR Article 78 to prohibit respondents from retrying him on an indictment on the ground that a retrial is barred by the constitutional proscription against double jeopardy.

Gregory J. Perrin of counsel (Perrin, Nachman & Stella, attorneys) for petitioner

Opinion

Michael R. Juviler of counsel (Herman Kaufman with him on the brief; Frank S. Hogan, District Attorney) pro se

Louis J. Lefkowitz, Attorney General of the State of New York, for respondents

Steuer, J.

Petitioner moves pursuant to article 78 for an order prohibiting respondents from trying him on indictment 6166/1969, or for any offense charged therein, on the ground that any such trial would amount to subjecting petitioner to being twice put in jeopardy for the same offense.

Petitioner appeared for trial on the said indictment on October 31, 1972, in Part 42 of the Supreme Court. He waived a jury and the trial proceeded before the court and testimony was taken. On November 3, petitioner, who was the defendant and will hereinafter be referred to as such, moved through his counsel for a mistrial on the ground that the district attorney had withheld exculpatory evidence. There followed a long discussion in which defendant's counsel was challenged to specify the evidence he claimed to be exculpatory. It finally developed that it consisted of statements of several persons to the effect that defendant had not been present at the restaurant at the time the crime charged was alleged to have been committed. The district attorney disclaimed the possession of any written material executed or signed by any such person, but admitted having heard of statements to that effect. The discussion was not specifc as to what the

defense claimed existed or as to exactly what material the prosecution possessed. November 3 was a Friday and the court ruled that the district attorney should give the defense a list of the names and addresses of all persons who had made such statements on the following Monday, and that the court would hear the defendant on what preparation he would require at that time. A list was submitted by the district attorney and the parties appeared on November 6. At that time the record does not disclose any immediate ruling on the motion for a mistrial but it was apparently assumed by all that the trial would proceed. However, taking of testimony did not resume and there was further discussion as to what the district attorney should produce. Unable to procure a satisfactory solution to what he deemed an impasse, and fearful that defendant's rights could not be protected, the court granted defendant's motion for a mistrial. The district attorney noted an exception. Defense counsel, who had taken no part in this last discussion, then announced that he joined in the objection and was willing to proceed. The court adhered to his decision and set a date for a new trial.

We conclude from the record that at the time the court granted the motion for a mistrial the defendant's motion had not been determined or withdrawn. In fact no definitive ruling prior to that time had been announced, and it was not until after announcement that the defendant indicated that he no longer desired the exculpatory material. It was not only the province of the court, but his duty, to rule on the application. After the ruling it was discretionary with him whether to allow a withdrawal. We are not concerned on this application whether this discretion was exercised as well as it might have been under the circumstances.

Opinion

Having sought the relief of a mistrial the defendant cannot claim double jeopardy if that relief is granted, whether properly or improperly. But even if it be assumed that there was no viable motion at the time the mistrial was granted, it does not follow that a new trial on the indictment is altogether foreclosed. "The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed." (*Wade v. Hunter*, 336 U.S. 684, 688-89.) Whenever the ends of justice might otherwise be defeated it is the duty of the trial judge to declare a mistrial. It was early recognized that it was impossible to list all the circumstances which would warrant such action but, if the decision rests on a sound discretion exercised with care and caution, the responsibility is that of the trial judge (*United States v. Perez*, 9 Wheat. 579). Even over the objection of the defendant, the trial judge, for any reason he deems compelling, may declare a mistrial and the defense of double jeopardy is unavailing (*Simmons v. United States*, 142 U.S. 148). Even where the trial judge is over-assiduous and his action premature, double jeopardy will not result (*Gori v. United States*, 367 U.S. 364). And this has been held even where the record does not clearly reveal the motivation of the trial judge in declaring the mistrial (*Gori v. United States, supra*, at 367).

The application is denied.

Opinion

All concur except Stevens, P.J., and Murphy, J., who dissent in a dissenting opinion by Murphy, J.

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Murphy, J. (dissenting)

We disagree and believe that a retrial of this defendant would violate his constitutional right not to be placed twice in jeopardy for the same offense. Petitioner's trial on a pending indictment was commenced on October 31, 1972 before a Trial Judge sitting without a jury and testimony was received. On November 2nd, defense counsel moved for a mistrial on the basis of an allegedly prejudicial article which had appeared in that day's issue of The New York Times. The Trial Justice advised counsel that he had not read the particular article referred to and volunteered to refrain from reading the Times during the pendency of the trial, which then continued. Significantly, in light of later events, the mistrial motion was neither expressly withdrawn nor denied; although all parties obviously assumed it had been completely disposed of. On November 3rd, the defense again moved for a mistrial, this time because of the prosecution's asserted failure to turn over to defense counsel certain exculpatory material then in its possession, in violation of the rule enunciated in *Brady v. Maryland* (373 U.S. 83). A lengthy colloquy ensued during which the prosecutor, inter alia, denied possession of any such exculpatory material. In any event, the matter was

apparently resolved when the prosecutor agreed to turn over to defendant, on that Friday afternoon, a list of witnesses who might have information of an exculpatory nature. The Trial Justice thereupon stated:

> "Under the circumstances, I'm reserving decision on the motion for a mistrial.
>
> "Mr. Perrin (defense counsel), if after you have examined this information as submitted by the district attorney, you still feel that you are being prejudiced, the defendant is being prejudiced, I will then hear further arguments, permit further arguments and then I will decide your motion."

Discussions were then held regarding the continuation of cross-examination, the granting of time to defense counsel to examine the list of names supplied and a possible visit to a certain specified restaurant.

It thus appears from the record before us that defendant's second mistrial motion (like the first one) was impliedly denied on the basis of subsequent discussions, albeit this time with leave to defendant to renew on a proper showing of continued prejudice. At the commencement of the next court day, November 6th, an unrecorded conference was held at the bench at which, both sides apparently agree, defendant's attorney advised the Court that he had received the requested list of witnesses and that he was prepared to proceed. The list was then offered and received as an exhibit for identification. After reference to another New York Times

article, a heated discussion ensued between the Court and the prosecutor over whether exculpatory material had been withheld. The police witness who had been on the witness stand when the trial was adjourned on the preceding Friday was recalled and questioned by the Court regarding possible exculpatory information which had come to his attention. After the witness was excused, the transcript discloses the following:

> "THE COURT: In view of the complexity of this case, and in view of the motions made by the defendant for a mistrial, based upon the fact that the District Attorney's Office had failed to supply the material directed by the Court, by motion and by me, of an exculpatory nature, material of an exculpatory nature, I feel this defendant has been so prejudiced; and accordingly your motion for a mistrial is granted.
>
> "MR. YASGUR (the prosecutor): May I point out to the Court —
>
> "THE COURT: You may point out anything you wish.
>
> "MR YASGUR: Counsel at the bench this morning when your Honor informed the Court and both of us, that your Honor was considering the motion for a mistrial, that counsel informed the Court that counsel was fully prepared to proceed this morning, did not wish an adjournment.

Opinion

"Your Honor seemed to indicate that you believed an adjournment would be requested. None was. Both sides have indicated we are prepared. Counsel hasn't stated that he needs any further time to prepare or that he has been prejudiced.

"Now, your Honor —

"THE COURT: I am addressing —

"MR. YASGUR: Your Honor —

"THE COURT: Don't overshout me, Mr. Yasgur.

"MR. YASGUR: I apologize to the Court.

"THE COURT: I don't feel there is any necessity of further discussion. I am reversing my decision of Friday, because I do feel this defendent has been so prejudiced. So, I am reversing my decision."

The prosecutor, obviously concerned about a possible double-jeopardy claim, then solicited and received a judicial admission that the decision was made on defendant's previously made motion. Defendant thereafter expressed his objection to the mistrial decision, but the Court still maintained that it was defendant's motion that was being granted. Despite such ruling, we do not believe a viable motion was then extant. The Court set conditions to the granting of the motion, i.e., if the defendant still felt prejudiced after examining the information supplied, then

further argument would be permitted and "then I will decide your motion." These conditions were not met. Also, the Court apparently considered that it had denied defendant's motion the previous Friday because of the Court's language "I am reversing my decision of Friday". Having made such determination the motion would no longer be viable, regardless of what ensued later on Monday. Both sides believed the matter had been concluded at the bench conference, if not earlier, and both sides objected to the granting of a mistrial. To hold that defendant's failure to explicitly withdraw his motion bars a double jeopardy claim would, under the circumstances of this case, clearly exalt form over substance.

If, as we contend, defendant's motion was no longer viable, and the mistrial was declared by the Trial Justice sua sponte, without defendant's consent and over his objection, then a lawful retrial may only be had if such trial discontinuance was granted in the sole interest of defendant because the ends of substantial justice could not have been otherwise attained. (*Cf. Gori v. United States*, 367 U.S. 364.) Although the courts have consistently refused to delineate the precise circumstances which would permit or preclude a retrial after the declaration of a mistrial without consent, it clearly appears that a "manifest necessity" for such declaration must be shown before another trial is permissible. (*U.S. v. Perez*, 9 Wheat. 579; *United States v. Jorn*, 400 U.S. 470; *Matter of Nolan v. Court of Gen. Sessions*, 11 N Y 2d 114.)

Thus, even if the Trial Justice believed he was acting solely in defendant's behalf, such worthy intent cannot preclude the consequences of his act since

"(r)eprosecution after a mistrial has unnecessarily been declared by the trial court obviously subjects the defendant to the same personal strain and insecurity regardless of the motiviation underlying the trial judge's action (which the double jeopardy provision was intended to prevent)." (*United States v. Jorn, supra*, 483.)

In the case at bar, there was no compelling need for the Trial Justice to have interjected himself between defendant and his counsel. The material sought by defense counsel had been obtained and he expressed his readiness to proceed with the trial. While we do not, by this dissent, question the Trial Justice's motives in declaring a mistrial, we do conclude that on this record there was no manifest necessity shown for such declaration. Another prosecution would, therefore, violate the double jeopardy provisions of the federal and state constitutions.

Accordingly, we would grant the petition and direct the issuance of the requested writ.

Stevens, P.J. concurs.

December 1, 1972

APPENDIX B
ORDER OF AFFIRMANCE

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of JAMES NAPOLI,

Petitioner,

vs.

THE STATE OF NEW YORK, THE SUPREME COURT OF THE STATE OF NEW YORK, THE SEVERAL JUDGES THEREOF, INDIVIDUALLY, AND AS JUDGES OF THE SAID SUPREME COURT, CRIMINAL TERM, COUNTY OF NEW YORK, and HON. FRANK S. HOGAN, DISTRICT ATTORNEY, NEW YORK COUNTY, AND HIS SUCCESSORS AND HIS REPRESENTATIVES,

Respondents.

Order affirmed, without costs, on the opinion by Mr. Justice Steuer at the Appellate Division.

All concur. Stevens, J., taking no part.

DATED: February 14, 1974.

Clerk.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

MAY 22 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1711

In the Matter of JAMES NAPOLI,

Petitioner,

against

THE STATE OF NEW YORK, THE SUPREME COURT OF THE STATE OF NEW YORK, THE SEVERAL JUDGES THEREOF, INDIVIDUALLY, AND AS JUDGES OF THE SAID SUPREME COURT, CRIMINAL TERM, COUNTY OF NEW YORK, and HONORABLE FRANK S. HOGAN, DISTRICT ATTORNEY, NEW YORK COUNTY, AND HIS SUCCESSORS AND HIS REPRESENTATIVES,

Respondents.

BRIEF OF RESPONDENT HOGAN IN OPPOSITION TO PETITION FOR CERTIORARI

On Writ of Certiorari to the Court of Appeals of the State of New York

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1711

In the Matter of JAMES NAPOLI,

Petitioner,

against

THE STATE OF NEW YORK, THE SUPREME COURT OF THE STATE OF NEW YORK, THE SEVERAL JUDGES THEREOF, INDIVIDUALLY, AND AS JUDGES OF THE SAID SUPREME COURT, CRIMINAL TERM, COUNTY OF NEW YORK, and HONORABLE FRANK S. HOGAN, DISTRICT ATTORNEY, NEW YORK COUNTY, AND HIS SUCCESSORS AND HIS REPRESENTATIVES,

Respondents.

BRIEF OF RESPONDENT HOGAN IN OPPOSITION TO PETITION FOR CERTIORARI

On Writ of Certiorari to the Court of Appeals of the State of New York

Preliminary Statement

Petitioner James Napoli seeks a Writ of Certiorari to review a judgment of the Court of Appeals of the State of New York, rendered February 14, 1974, which unanimously affirmed a judgment of the Appellate Division, First Judicial Department, rendered December 12, 1972, dismissing a petition, filed pursuant to Article 78 of the

New York Civil Practice Law and Rules, by which James Napoli sought a writ of prohibition to preclude, on double jeopardy grounds, his retrial for the crimes of perjury and criminal contempt.

Opinion Below

The Court of Appeals in unanimously affirming the judgment of the Appellate Division, adopted the majority opinion of the latter court. 33 N.Y.2d 980. In relevant portion, the Appellate Division majority found, as a matter of fact:

> "* * * that at the time the court granted * * * a mistrial the defendant's motion for a mistrial had not been determined or withdrawn. In fact no definitive ruling prior to that time had been announced, and it was not until after announcement that the defendant indicated that he no longer desired [a mistrial]. It was not only the province of the court, but his duty, to rule on the application. After the ruling it was discretionary with him whether to allow a withdrawal * * * Having sought the relief of a mistrial the dedefendant cannot claim double jeopardy if that relief is granted * * *." 40 A.D.2d 159, 160-1.

The two justices of the Appellate Division who dissented found, as a matter of fact, that at the time the trial court declared a mistrial "defendant's motion was no longer viable * * *." 40 A.D.2d at 164.

Jurisdiction

The jurisdiction of this Court is predicated upon 28 U.S.C. §1257(3).

Question Presented

Whether a factual finding by the State courts, that petitioner was granted a mistrial in response to his own motion for a retrial, should be disturbed by this Court where the State courts' findings are reasonably supported by the record.

Statement of the Case

Petitioner was indicted on December 15, 1969, for the crimes of perjury and criminal contempt. On April 28, 1970, Napoli, through his experienced counsel, Gregory J. Perrin, Esq. (*see* petition, p. 30), moved to dismiss the indictment alleging that the prosecutor "deliberately" withheld exculpatory evidence from the grand jury. Several days later, defense counsel filed another, virtually identical motion. Although these several motions were denied in June of 1970, Mr. Perrin renewed them September 30, 1970, again alleging an intentional suppression of exculpatory evidence. This renewal of the motion was also denied.

On August 29, 1972, the defense submitted a pre-trial motion to compel the prosecutor to comply with this Court's mandate in *Brady* v. *Maryland*, 373 U.S. 83 (1963). That motion, in relevant part, was denied because "the information sought by the defendant as 'Brady' material is in fact within the knowledge of the defendant * * *." The case then proceeded to a trial without a jury before a judge [BLANGIARDO, J.] whose judicial experience was virtually limited to civil cases; indeed he was elected to the New York City Civil Court and was serving in the Supreme Court by designation.

After the People's first witness had commenced his testimony, Mr. Perrin moved for a mistrial alleging that prejudicial pretrial publicity had "so compromised the defendant * * * that I do not believe that we are in a position to receive a fair trial" (RA 575).* The court promised to refrain from reading allegedly prejudicial news stories and, without specifically denying the motion, the trial proceeded (RA 582, 583-84).

Mr. Perrin then repeated his demand for *Brady* material. The prosecution, noting that there was none, offered counsel a list of the witnesses' names

> "* * * for the sake of expediting this proceeding [although] * * * I'm sure he already has [them]" (RA 641-44).

Not satisfied, Mr. Perrin announced:

> "Your Honor, if I may say just this. The question [regarding exculpatory statements] wouldn't have been necessary if at the onset of the trial you had not been told that there was no *Brady* material. I have to find it, it is there. I don't have it. I am not the district attorney, I didn't conduct this investigation, I asked for the *Brady* material, I was told there was none. Now, this morning we are going to receive a list concerning one aspect of it; now, all of a sudden we find there is more" (RA 750).

And then Mr. Perrin moved for a mistrial again:

> "My motion is for a mistrial. Under the rule in Brady against Maryland, United States Supreme Court, we are entitled to all exculpatory material in

* Numerical references preceded by RA refer to the respondent's appendix in the New York Court of Appeals.

the possession of the People and we are entitled to that material, your Honor, prior to the trial.

"At the onset of this trial, I requested if such evidence was in existence.

"The assistant district attorney indicated that there was no such evidence. He affirmed that statement again during the course of the trial and I have the page in the record if the Court wants to hear it.

"Through the examination of Detective Coffey, it became readily apparent that there was such evidence.

"The People indicated that they would be willing to give the names of witnesses who made exculpatory remarks. They did not offer to turn over to us the evidence and they haven't even turned over the names.

"Under the circumstances, Your Honor, I believe the defendant to have been very severely prejudiced.

"This is the type of conduct that shouldn't happen in the course of a criminal case. As I have said to you before, this is not trial by ambush.

"We are trying to seek out the truth and whatever evidence they have of that nature, its his duty, as a prosecutor, as a lawyer, to turn it over to us and he denied the existence of it.

"And under the circumstances I believe that we have been severely prejudiced and harmed in the extent to which we can properly present a defense" (A 66-7).*

The prosecutor again told the court that he had no *Brady* material, but that he would turn over to Mr. Perrin the previously promised list of names. Mr. Perrin objected:

"I think under the case I don't think that's sufficient. In fact, I can quote the case for you, if you would like that.

* * *

* Numerical references preceded by A refer to the petitioner's appendix in the New York Court of Appeals.

"Your Honor, I'm afraid that's [list of names] not sufficient.

"*Brady* is clear. Exculpatory material that indicates he's not guilty of any crime or reduces the extent of the crime that he might be guilty of, should be turned over to the defense.

* * *

"If this evidence is available, I'm entitled to it. I should have had it before now" (A 67-8).

Mr. Perrin repeated his assertion that the People were concealing *Brady* material ["it's there" (A) 71], and then impugned the integrity of the prosecutor:

"What are we trying to do here, your Honor? Is this going to be what's in quotes a frame up or is this a trial?" (A 73).

Mr. Justice BLANGIARDO then directed that, after the weekend recess the prosecutor supply to Mr. Perrin the list of names (A 76), as well as "any written statements prepared by a witness * * * or signed or subscribed to by a witness" (A 78). He added,

"Under the circumstances, I'm reserving decision on the motion for mistrial.

"Mr. Perrin, if after you have examined this information as submitted by the district attorney, you still feel that you are being prejudiced, I will then hear further arguments, permit further arguments and then I will decide your motion" (A 79-80).

Mr. Perrin, apparently still dissatisfied, then sought to have the court's directive to the prosecutor broadened to include "all statements taken under oath" (A 80), and specifically, grand jury testimony (A 81-2). The court again reserved decision and offered to "accept any briefs that you wish

to submit on that point" (A 81). The prosecutor promised Mr. Perrin the list of witnesses' names by Monday morning and court adjourned (A 89-90, 96).

That following Monday, the prosecutor informed the court that the list of names had been given to Mr. Perrin (A 98-99). The following colloquy then occurred:

> "The Court: Let me state this for the record. There have been a number of problems in this case.
>
> * * *
>
> "The most serious of all problems, I think—the newspapers, of course that has been one problem. The most serious of the problems I find during the course of this trial * * * has been the failure of the District Attorney's Office to turn over all exculpatory material.
>
> "I have directed the District Attorney's Office; and finally, at this late date, the list of ten names—I am told this morning ten names were turned over, is that correct?
>
> "Mr. Yasgur [prosecutor]: There was no exculpatory material turned over. I have reported to the Court there is no such material" (A 106-7).

A long colloquy followed in which the prosecutor and Mr. Justice Blangiardo differed over their interpretations of *Brady* material (A 107-15), and the court finally announced, without any objection by the defense:

> "In view of the complexity of this case, and in view of the motions made by the defendant for a mistrial, based upon the fact that the District Attorney's Office had failed to supply the material directed by the Court, by motion and by me, of an exculpatory nature, material of an exculpatory nature, I feel this defendant has been so prejudiced; and accordingly your motion for a mistrial is granted" (A 115).

Another colloquy then ensued in which the prosecutor and the court, without any protest by the defense, clarified the record:

> "Mr. Yasgur [the prosecutor]: I want the record to be quite clear, your Honor, that this decision of the Court is made in response to counsel's motion for a mistrial. As I have explained to the Court this morning, if your Honor makes—grants a mistrial here, and it is not clearly on counsel's motion, then your Honor may be creating a double jeopardy issue in this case.
>
> "The Court: There is no double jeopardy. I am granting defense counsel's motion. The District Attorney's Office is not consenting to it.
>
> "Mr. Yasgur: That is correct.
>
> • • •
>
> "Mr. Yasgur: The People now respectfully move the case of The People against James Napoli for trial.
>
> "The Court: Not at this time. I will adjourn this matter for two weeks.
>
> "Mr. Yasgur: The People, your Honor, take exception to the Court's ruling" (A 116-17).

When the prosecutor requested that Mr. Justice Blangiardo reconsider this decision, the court refused to do so and directed counsel to "pick a date" for a new trial (A 115-121).

Having successfully aborted the trial, the defense then sought to bar a retrial. Mr. Perrin, who had been conspicuously mute throughout these two, dispositive colloquies, nonchalantly announced:

> "I would be constrained to say at this time that the defendant objects to this granting of a mistrial at this time" (A 121).

Mr. Justice Blangiardo, obviously surprised, promptly noted that "after I granted the motion, defendant * * * is now withdrawing the motion" (*id.*). A recess was ordered, after which the prosecutor, who fully comprehended the motive behind counsel's strategic "objection" to the court's decision to grant his motion, cautioned Mr. Justice Blangiardo:

> "* * * counsel now, by his arbitrary and capricious change in position, has placed the People in a situation where his flip-flopping on this issue may well bar Jimmy Napoli from ever being brought to trial.
>
> * * *
>
> "But now counsel has abandoned the Court, after the Counrt decides a motion in his favor and counsel now objects to the Court deciding a motion in his favor and this may well raise serious issues as to whether or not the mistrial bars a retrial on grounds of double jeopardy" (A 127-8).

Mr. Perrin then abandoned all of his arguments previously made about prejudice and *Brady* material, and his contention that the list of names was only "one aspect" of the *Brady* material he sought (Perrin: RA 750):

> "At that time [Friday], your Honor, after having heard arguments from both sides, you directed him [the prosecutor] to turn over on Friday a list of those witness that would supply or could possibly supply exculpatory evidence to the defendant. Thereby, your Honor, curing any objection that we would have had at that time as a result of the lack of the evidence * * *.
>
> "[O]n that day [Friday] you effectively decided the motion against the defendant and * * * you gave the defendant the option to renew that motion on Monday, if I saw fit, due to the nature of the list that was given to me * * *.

> "The defendant did not exercise the option to renew the motion and this morning effectively withdrew any such motion by indicating to you that we were ready to proceed * * *.
>
> "We submit to you that there is no manifest necessity for this, at this time and the motion at this time —rather the declaration of a mistrial is not as a result of any actions taken by the defendant" (A 130-2).

Mr. Justice BLANGIARDO reaffirmed his understanding that "after my ruling defense counsel in effect withdraws his motion for a mistrial" (A 133). He declined to alter his decision (*id.*), and scheduled a new trial for November 27, 1972 (A 135).

Prior to the commencement of Napoli's second trial, petitioner commenced a special proceeding in the Appellate Division, First Judicial Department, pursuant to Article 78 of the New York Civil Practice Law and Rules, for an order of prohibition to bar his retrial on double jeopardy grounds. That court, in a three-to-two decision, dismissed Napoli's petition and refused to issue an order of prohibition on December 12, 1972. Thereafter, the New York Court of Appeals, by a unanimous decision rendered February 14, 1974, affirmed the Appellate Division's decision. The criminal trial of petitioner is currently scheduled to begin on May 23, 1974.

Subsequent to the argument of the instant case in the New York Court of Appeals, Respondent Frank S. Hogan resigned as District Attorney of New York County. Richard H. Kuh was thereafter sworn in as District Attorney of New York County and, pursuant to New York Civil Practice Law and Rules Section 7802(b), became the successor in law to Respondent Hogan.

ARGUMENT

No substantial constitutional issue is presented by petitioner's factual argument that his motion for a mistrial had been withdrawn prior to the court's declaration of a mistrial.

Napoli seeks a writ of certiorari to review a state court decision that his retrial is not precluded by the double jeopardy provisions of the Federal and State Constitutions. His case is *sui generis* and presents merely a factual issue which is not worthy of review by this Court. *Donnelly* v. *De Christoforo,* No. 72-1570, 15 Cr. L. 3062, 3065 (concurring opinion of Mr. Justice STEWART).

Concededly, Napoli had been placed in jeopardy when his counsel, Gregory Perrin, made one of petitioner's numerous motions for a mistrial, asserting that the prosecutor had failed to provide the defense with supposedly exculpatory evidence and that the failure, in Mr. Perrin's opinion, "very severely prejudiced" Napoli "on the extent to which [he] can properly present a defense." The court, after directing the prosecutor to furnish the defense with a list of witnesses' names, which Mr. Perrin described as only "one aspect" of the demanded evidence, reserved decision on the motion for a mistrial.

When court reconvened, the trial justice was informed that the list of names had been provided to Mr. Perrin. Nevertheless, accepting Mr. Perrin's representation that Napoli had been "prejudiced," and motivated by "the motions by the defendant," the court granted a mistrial. Defense counsel, for the first time, then informed the court

that he "would be constrained to say * * * that the defendant objects to the granting of a mistrial at this time."

Under these circumstances the State courts reasonably determined that Napoli's motion for a mistrial had been extant at the time it was granted and that, under well-settled law, his retrial was not precluded. *United States* v. *Tateo*, 377 U.S. 463, 467 (1964); *United States* v. *Ball*, 163 U.S. 662 (1896).

Petitioner's argument to the contrary is largely predicated upon the trial court's statement, made on the day it declared a mistrial, that it was "reversing" an earlier denial of petitioner's motion (A 116-17; petition, at pp. 21, 27). His reliance upon that statement manifests a lack of candor. For, as Petitioner was specifically advised below (*see* respondent's brief in New York Court of Appeals, p. 38, fn. 2) the court expressly corrected that mistatement, noting,

> "On Friday a motion was made by defense counsel for a mistrial. He gave various grounds why the defendant was prejudiced. I reserved decision at that time * * * Now, I reserved decision on Friday, I have ruled on it [the motion] today * * * After my ruling defense counsel now in effect withdraws his motion * * * My ruling will stand" (A 132-33).

In essence, petitioner seeks to vindicate an unsuccessful trial strategy in this Court which, with all due respect to Mr. Perrin, an experienced criminal lawyer (*see* petition, p. 30), appeared to be clever at the time. Whenever the trial justice denied one of Napoli's numerous motions for a mistrial a new issue, raisable in the appellate courts on

a judgment appeal, was injected into the case. Conversely, when the trial court granted Napoli's motion for a mistrial, counsel merely registered a belated objection in order to provide himself with a double jeopardy claim, litigable in a collateral proceeding for a writ of prohibition.

To grant the substantive relief sought by petitioner would constitute a dangerous precedent, inviting repetitive, baseless motions for a mistrial as a strategic method of creating specious issues, formenting litigation, and forestalling a prosecution. This Court should not sanction such a trial tactic by disturbing the State court decisions herein.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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